

Human Rights Consortium – Written evidence (FUI0007)

Human Rights Consortium Submission to the House of Lords Sub-Committee
Inquiry into Ireland/Northern Ireland Protocol

Overview

What is your assessment of the overall socio-economic and political impact of the Protocol on Ireland/Northern Ireland since the publication of this Committee’s introductory report in July 2021? What lessons can be drawn from the Protocol’s operation since it came into force?

1. The Ireland /Northern Ireland Protocol (the Protocol) continues to be at the heart of political and public debate in Northern Ireland with both its practical and perceived impacts remaining contested issues. From a trade and economic perspective, a certain degree of delay and disturbance to trading relationships between Northern Ireland and Great Britain was inevitable once the UK government opted for a situation whereby Northern Ireland had separate bespoke provisions for accessing and complying with EU Customs Union and Single Market arrangements. This contrasts with original proposals to retain UK wide access to the single market and Customs Union. Regulatory checks from GB to NI became necessary to avoid a hard border on the island of Ireland once that UK wide approach was rejected. The current trading approach was negotiated and accepted by both the EU and UK. Much of the current difficulties stem from failures to abide by the specifics of that agreement.

2. From a socio-economic perspective, while there have been concerns about increased costs of living and difficulties accessing certain goods, it is also unclear to what extent these difficulties can be attributed directly to the operation of the Protocol or to EU Withdrawal more widely¹ and/or the general economic downturn² following the Covid-19 pandemic³. Other indicators of trading barriers, such as the number of GB retailers who have ceased to deliver to Northern Ireland citing EU Exit as the reason, have slowly reduced in the time since the Protocol first entered in to force.⁴

¹ <https://committees.parliament.uk/writtenevidence/37314/pdf/>

² [UK economy faces a difficult start to 2022 despite the end of COVID-19 restrictions](#)

³ [Covid: UK’s economy shrunk faster than at any point in 100 years in 2020](#)

⁴ [Overview note: GB retailers not delivering to Northern Ireland](#), Consumer Council Northern Ireland, May 2022

3. From a rights perspective the Protocol does contain important, if limited, non-diminution protections to mitigate against the loss of rights which has occurred following the UK's exit from the EU. However, we remain highly concerned at the UK Government's ongoing disregard for these important protections in its legislative outputs. We also have significant concerns regarding the lack of an Executive and functioning Assembly (linked to political opposition to the Protocol from the DUP) which is causing widespread harm to businesses and people on the ground struggling with the cost-of-living.⁵

How can the current political impasse between the UK and the EU over the Protocol be resolved?

4. The Ireland/Northern Ireland Protocol contains clear mechanisms to deal with concerns between the EU & UK regarding the practical implementation of the Protocol. Both the Joint Committee and the Specialised Committee on Ireland/Northern Ireland provide platforms to discuss ongoing implementation issues for the Withdrawal Agreement and the Protocol. The UK Government's decision to take unilateral action outside of these processes displays a lack of good faith and willingness to come to a reasonable compromise within the structures of the Protocol. Further, a renewed focus on the actual concerns of communities in Northern Ireland, and on reasonable, evidence-based proposals workable within the rule of law, is required. Since last July the UK has introduced issues such as opposition to the oversight of the European Court of Justice (ECJ)⁶ for the trade elements of the Protocol in Articles 5-10. Yet no evidence exists to suggest that this has been a point of friction for trade or a point of concern for the public.⁷

The Practical Impact of the Protocol

⁵ ['Cost of living: 'It's like sitting on death row''](#), BBC News NI

⁶ ['Northern Ireland Protocol: the way forward'](#), para 41

"We should look to normalise the governance basis of the Protocol so that the relationship between the UK and the EU is not ultimately policed by the EU institutions including the Court of Justice."

⁷ ['What Do Voters in Northern Ireland Think About the Protocol on Ireland/Northern Ireland?'](#) Feb 22, David Phinnemore, Katy Hayward and Lisa Whitten

When asked to rank issues relating to the Protocol in order of concern, three quarters of respondents (75%) were concerned about the supply of medicines into Northern Ireland. A majority (66%) were also concerned with the lack of NI input into the governance of the Protocol and current customs arrangements (57%). ECJ jurisprudence was almost evenly split, with 45% expressing concern and 46% expressing a lack of concern.

Which aspects of the Protocol's operation are creating most difficulties?

Which practical modifications to the operation of the Protocol would make it operate more effectively?

5. The main issue of concern as we see it is the UK Government's determination to effectively undermine or disapply important aspects of the Protocol which deal with trade and business while at the same time showing a willingness not to take full account and consideration of its duties under the Article 2.1 duties of the Protocol to the non-diminution of rights in Northern Ireland. This will be further explored in paragraphs 20-22.

6. In terms of practical modifications to the Protocol, the Consortium recommends no slippage in the human rights protections provided through Article 2 of the Protocol, and would argue for an open and expansive reading of these protections, a comprehensive assessment of which aspects of Retained European Union Law (REUL) apply to Article 2, and an ongoing commitment to adequate analysis by both the EU and UK of future legislation to assess whether or not it interacts with the provisions of the Protocol in any way.

7. One aspect which could be improved is the degree of transparency for the three bodies responsible for overseeing the implementation of the Protocol – the Joint Committee, Specialised Committee and Joint Consultative Working Group. Northern Ireland could have a political and civil society presence and/or inputs to these mechanisms and in turn help increase ownership for the Protocol.

Benefits and potential opportunities

What, if any, benefits has the Protocol had for Northern Ireland, and what, if any, potential opportunities might it provide for?

8. The Protocol provides significant benefits for Northern Ireland. In addition to the ongoing access it maintains to the EU customs union and the open border on the island of Ireland, it provides significant, if not imperfect human rights protections. Article 2.1 of the Protocol commits the UK government to the non-diminution of rights in Northern Ireland and to 'keep pace' with the 6 non-discrimination directives listed in Annex 1 of the Protocol.

9. For instance, the EU Commission has proposed a Pay Transparency Directive⁸ which it states would "strengthen the existing enforcement tools and procedures

in regard to the rights and obligations laid down in the equal pay provisions set out in Directive 2006/54/EC," a Directive specifically listed in Annex 1 of the Protocol. If the Pay Transparency Directive updates or amends the Annex 1 Directive, which relates to gender equality in employment, the legal framework in NI should 'keep pace' with those protections and incorporate the relevant provisions into law.

Alternatives to the Protocol

Is there a viable alternative to the Protocol? To what extent would such alternatives address the priorities and concerns of each side?

10. As noted in paragraph 4, the Protocol provides mechanisms for dispute resolution and enables both parties to raise issues relating to its implementation. Renegotiation of the Protocol would likely result in further instability and uncertainty for businesses, individuals and civil society in NI. Current negotiations on the Protocol should seek to preserve and strengthen provisions contained within Article 2. Once again the Consortium would urge a recommitment to upholding and respecting the agreements already in place.

Social and political attitudes to the Protocol

How would you characterise the attitudes of the communities in Northern Ireland in relation to the Protocol? Are these attitudes evolving, and what impact is this having on inter-community relations?

11. On the whole, the opinion of the Northern Ireland populace towards the Protocol is mixed. According to research by Queen's University, half of the public think that, on balance, the Protocol is a "good thing for NI", while around 41% disagree⁹. 33% of respondents to the Northern Ireland Life and Times survey question of similar wording perceived the Protocol positively, with 21% alleging it to be a bad thing for NI and a further 33% deeming it a 'mixed bag'.¹⁰ These attitudes are clearly evolving, with perceptions of the Protocol improving over the past year.

⁸ ['Pay Transparency: Commission proposes measures to ensure equal pay for equal work'](#) – press release

⁹ As above, ref 7

¹⁰ ['Political Attitudes in Northern Ireland after Brexit and under the Protocol'](#), ARK research update

12. There is a significant issue with the portrayal and perception of the Protocol as the source of issues affecting communities in NI. The Prime Minister claimed it is preventing Westminster tackling the cost-of-living crisis¹¹, the DUP claimed that full implementation of the Protocol would cause an 'economic tsunami'¹², and their leader Jeffrey Donaldson sought "assurance that... the Protocol will not be allowed to prevent people in Northern Ireland from receiving the help that they need" in dealing with the cost-of-living crisis.¹³ Evidence for these claims has not been provided but the increased polarisation around the Protocol could, at least in part, be attributed to the heightened rhetoric and claims surrounding its economic impacts.

13. It is perhaps understandable that sections of our community who value Northern Ireland's place within the United Kingdom are upset at the placement of regulatory checks for goods moving from GB to NI. However, concerns about these provisions affecting Northern Ireland's place within the union are more perceptual, rather than practical. There was already a level of checks on certain goods moving between GB and NI before the UK's exit from the EU. These new checks are also the compromise position arrived at by both the EU and UK in order to avoid a hard border on the island of Ireland. The checks and arrangements that are in place have certainly created some practical problems, but the position of Northern Ireland is secured within the United Kingdom until a border poll is triggered by the Secretary of State and a majority of people vote to change that position. Claims that the NI Protocol violates aspects of the Belfast/Good Friday Agreement have also been dismissed in recent court judgments¹⁴.

What impact has the Protocol had on continued political instability and uncertainty in Northern Ireland, and vice versa? In the context of the outcome of the May 2022 Northern Ireland Assembly elections, how can these political disagreements over the Protocol be overcome?

14. Brexit itself has caused significant uncertainty and fragility in the political landscape of NI. There are significant, and well-founded, concerns that rights

¹¹ ['Boris Johnson: Northern Ireland Protocol stopping us tackling cost-of-living crisis'](#), The Telegraph

¹² ['Full Protocol implementation would mean 'economic tsunami', says DUP'](#), UTV

¹³ [PMQs May 25th Hansard Report](#)

¹⁴ [Brexit: Northern Ireland Protocol is lawful, court rules](#)

and enforcement mechanisms are being eroded in Northern Ireland as a result of Brexit and the UK Government's trajectory of de-regulation. This in turn continues to fuel the re-opening of discussions around the constitutional future of the region.¹⁵

15. In late 2021, the DUP announced they would cease engaging in the majority of north/south structures of Strand II of the Belfast (Good Friday) Agreement¹⁶, and in February 2022 the party withdrew their First Minister and triggered the collapse of the Executive.¹⁷ Between these events, the DUP Agriculture Minister attempted to violate elements of the Protocol by ordering port officials to cease certain checks and controls on the movement of agri-food goods into Northern Ireland from Great Britain¹⁸. Following the May 2022 Assembly elections, the DUP has continued to block the formation of the Executive. More than any element of the Protocol, the political and economic instability stemming from these actions has caused widespread uncertainty for businesses¹⁹ and communities on the ground²⁰.

How can concerns about the perceived democratic deficit at the heart of the Protocol, in view of the continued dynamic application of significant areas of EU law to Northern Ireland in the absence of UK participation in the EU institutions, be addressed?

16. Democratic consent for the continued application of the trade elements of the Protocol is built in to Article 18. This requires the NI Assembly to vote on the continued application of Protocol Articles 5 through 10 in 2024, which will be followed up with a cross-community vote in 2028 and again in 2036. This provides the opportunity for democratic consent to be given or revoked by the Assembly.

¹⁵ As above, ref 10, '[Political Attitudes in Northern Ireland after Brexit and under the Protocol](#)' 30% of respondents to a question on the long-term constitutional future of Northern Ireland supported a united Ireland, an increase of 4% from 2020 and a continuation of a steady increase since 2018. 63% of respondents expressed the belief that Irish unification was more likely as a result of Brexit. Further, 37% stated that Brexit made them more in favour of a united Ireland, continuing a steady increase since 2016.

¹⁶ '[DUP leader Sir Jeffrey Donaldson's keynote speech on the NI Protocol](#)'

¹⁷ '[NI First Minister Paul Givan announces resignation](#)', BBC News

¹⁸ '[Northern Ireland minister orders halt to Brexit agri-food checks](#)', The Guardian

¹⁹ '[Retail NI comments on Foreign Secretary Protocol statement](#)'

"The local business community needs certainty and stability and not ongoing disputes on the Protocol. The election of NI Assembly Speaker and establishment of the Executive needs to happen immediately."

²⁰ '[Cost of living: No clarity on £400 energy bill discount](#)'

17. In terms of the development of EU legislation affecting Northern Ireland, local politicians have proposed granting observer status to NI civil society and elected representatives when legislation relating to NI is considered in the European Parliament.²¹ It is imperative, though, that any attempt to address the perceived 'democratic deficit' does not undermine the 'keeping pace' requirement, which is vital for the maintenance of individual rights and equality protections in NI.

18. The current dynamic application of certain EU regulations is essential for NI's continued membership of the EU Customs Union and Single Market, which in turn carries significant importance for the avoidance of a hard border on the island of Ireland. Any attempt to remove the principle of dynamic alignment may (intentionally or unintentionally) also undermine the important requirement to 'keep pace' with equality Directives listed in Annex 1 of the Protocol.

19. The issue of local political consent seems to be raised selectively by the UK government. There are several current proposals being taken forward by the UK government that intersect with the devolved powers of the NI Assembly and protections within the Belfast/Good Friday Agreement, including some of those progressed through the recent Queen's Speech, yet there are currently no plans afoot to seek the consent of locally elected politicians.

The UK and EU approach

What is your assessment of the UK Government's approach to and management of the impact of the Protocol since the publication of its Command Paper in July 2021?²²

20. The recent actions of the Government have demonstrated a commitment to undermining or ignoring Article 2 of the Protocol, directly pursuing a diminution of rights, and contributing to widespread instability in Northern Ireland. The 2022 Elections Act²³ could constitute a violation of the Government's non-diminution commitment by removing the ability of EU citizens resident in NI to vote/stand for election in District Council elections locally²⁴. The 'Rights,

²¹ [European Affairs Committee, Protocol on Ireland/Northern Ireland Sub-Committee, Uncorrected oral evidence: Follow-up inquiry on impact of the Protocol on Ireland/Northern Ireland](#)

²² For further discussion of the UK Government's approach to transparency and accountability regarding its review of Retained EU Law, please see the Civil Society Alliance's response to this Inquiry.

²³ [Elections Act 2022](#)

Safeguards and Equality of Opportunity' chapter of the GFA protects the 'civil rights' of 'everyone in the community', which is considered to include the right to vote and stand for election.²⁵

21. The Government's proposed Brexit Freedoms Bill attempts to challenge the supremacy of EU retained law & make it easier to revoke and amend this law through secondary legislation. As noted by Professor Chris McCrudden, "the danger is that a wholesale removal of EU retained law that does not take into account its relationship with Article 2 [...] could unintentionally lead to either divergence with the rest of the UK or the diminution of the Belfast/GFA protected rights, leading to a breach of Article 2."²⁶ Both the Consortium²⁷ and the NIHRC²⁸ have also previously advised against enabling lower courts to challenge or diverge from REUL as it would cause further legal uncertainty.

22. Further, the aforementioned Nationality & Borders Act contains provisions relating to victims of trafficking which could, if applied in Northern Ireland, infringe on Article 2 of the Protocol. As noted by the NIHRC and ECNI²⁹, there are a wide variety of areas the Bill legislates on which would contravene aspects of the EU Trafficking Directive, which the NIHRC deems to apply under Article 2 due to its close relation to the Belfast (Good Friday) Agreement's protection of the rights of victims.³⁰ There are related concerns regarding Clause 71 of the Act, requiring Electronic Travel Authorisation for EU citizens moving across the border from Ireland to Northern Ireland.³¹

What would be the political, legal and socio-economic impact if the UK Government a) brings forward domestic legislation in relation to the Protocol, and/or b) uses the safeguarding mechanism contained in Article 16 of the Protocol?

²⁴ ['Joint ECNI/NIHRC Briefing on the provisions on Voting/Candidacy Rights of EU citizens in Northern Ireland and the Elections Bill'](#)

²⁵ As above

²⁶ ['European Scrutiny Committee Oral evidence: Retained EU Law: Where next?, HC122'](#)

²⁷ ['Retained EU Case Law: Consultation on the departure from retained EU case law by UK courts and tribunals'](#), Human Rights Consortium response

²⁸ 'NIHRC Briefing Paper: Ministry of Justice Consultation on Retained EU Case Law', page 11, para 3.16

²⁹ ['Joint NIHRC / ECNI Briefing Paper on the Modern Slavery and Human Trafficking and Electronic Travel Authorisation provisions in the Nationality and Borders Bill'](#), para 4 & 5

³⁰ ['Human Trafficking and Article 2 of the Ireland/Northern Ireland Protocol'](#)

³¹ As above, ref 29

23. The UK Government taking unilateral action on the Protocol will impact the stability of the wider Protocol beyond the specific Articles it intends to amend, putting the rights and protections contained in Article 2 at risk. Retaliatory action from the EU also has the potential to generate instability and cause widespread political uncertainty. Invoking the Article 16 safeguarding mechanism would necessitate first discussing proposals through the dispute resolution mechanisms contained within this Article, bringing issues to the EU-UK Joint Committee to try to find other solutions. The emergency invocation of Article 16 without due regard for these processes would further impact trust in the UK Government to uphold international agreements and reach a reasonable solution to these issues.

What is your assessment of the EU's approach to and management of the impact of the Protocol over the past year, including the publication of its four 'non-papers' in October 2021? Has it done enough to take account of concerns over the Protocol?

24. The EU has shown good faith through their continued engagement in talks regarding the Protocol despite the upcoming unilateral action from the UK Government and the disruption caused by NI ministers attempting to contravene certain provisions within the Protocol. The four non-papers³² provided a reasonable and credible starting point for discussions, proposing ways in which disruption to goods movement can be addressed within the existing mechanisms of the Protocol.

25. Further, the EU demonstrated flexibility and willingness to address arising issues through the introduction of EU legislation³³ to enable the continued supply of medicines from GB to NI. It has also sought to engage the views of local civil society organisations to inform their negotiations with the UK and ensure that the views of civil society and communities in NI are represented in these discussions.³⁴

Do you see any grounds for compromise between the UK and EU's positions that would respect both sides' concerns?

³² [Protocol on Ireland/Northern Ireland non-papers](#)

³³ ['Protocol on Ireland/Northern Ireland: Commission proposes bespoke arrangements to benefit Northern Ireland'](#)

³⁴ ['Protocol on Ireland and Northern Ireland, Non-Paper, Engagement with Northern Ireland Stakeholders and Authorities'](#)

26. It should be in the gift and mandate of both parties to protect the Good Friday Agreement, uphold rights and work within the mechanisms of existing international agreements. The UK Government's commitment to wholesale rewriting of certain elements of the Protocol and unilateral action is bringing us further away from a reasonable solution. Any compromise and negotiations should take place through these mechanisms and avoid the current public recriminations or provocation through unilateral action.

1 June 2022